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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1991

BRENDA POPE,
Petitioner

v.

MCI TELECOMMUNICATIONS CORP.,
Respondent

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the ruling of the U.S. District Court for the Southern District of Texas, which the Fifth Circuit Court of Appeals has affirmed, deny Petitioner's rights under substantive Texas law?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BRENDA POPE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Fifth Circuit Court of Appeals, and its interpretation and application of substantive Texas law.

OPINIONS BELOW

The course of proceedings and disposition below by the District Court and Fifth Circuit are crucial in this wrongful discharge and employment discrimination case. On June 6, 1986, the Petitioner filed a charge of discrimination with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission

alleging unequal compensation and harassment on account of her race and sex. (Appendix "A"). The Petitioner received a Notice of Right to File Civil Action, and filed her original Petition in Texas state court on May 22, 1987. (Appendix "B"). She filed an Amended state court Petition on July 8, 1987. On August 3, 1987, Respondent removed the case to the United States District Court for the Southern District of Texas. On August 14, 1987, Petitioner filed Plaintiff's Response to Defendant's Petition for Removal seeking remand. In her Second Amended Complaint, which she presented to the District Court, Petitioner added a claim for unlawful termination in violation of the Texas Workers' Compensation Act stemming from her discharge on March 30, 1989 after she instituted proceedings for Workers' Compensation benefits resulting from an on-the-job injury she had suffered in January of 1989 prior to her termination. On August 16, 1989, the Petitioner filed a second Charge of Discrimination with the Texas Commission on Human Rights (Appendix "C"), alleging that she was unlawfully denied a promotion and terminated in retaliation for her earlier filing of a Charge of Discrimination alleging unequal compensation, race and sex harassment claims. She received a Notice of Right to File Civil Action and amended her District Court complaint to assert the additional cause of action. (Appendix ("D"). On June 1, 1990, the District Court denied the Petitioner's Motion to Amend her complaint, a fourth time, to include a claim for intentional infliction of emotional distress, denied Petitioner's Motion to Remand and acting on the Petitioner's Third Amended Complaint, which asserted

state law causes of action for racial and sex harassment, unequal compensation, retaliatory denial of promotion and unlawful discharge for instituting a Workers' Compensation claim, granted the Appellee's Motion for Summary Judgment on all the Respondent's claims. (Appendix "E"). The Court below held the Petitioner's unequal compensation, sex, racial harassment and retaliatory denial of promotion claims were time-barred. (Appendix "F"). The Court also concluded that no genuine issue of material fact was presented regarding the Petitioner's claim for unlawful discharge under the Texas Workers' Compensation statute, reasoning that the Petitioner had failed to demonstrate an adequate causal connection between her filing of a claim and her subsequent discharge. (*Id.*). On July 18, 1990 the District Court entered an Order awarding Respondent attorney fees and costs. (Appendix "G").

These decisions were incorporated in three separate documents signed by the District Court on June 1, 1990: 1) an Order denying Pope's motion for leave to amend; 2) a Memorandum and Order denying Pope's motion to remand and granting MCI's motion for summary judgment; and 3) a Final Judgment in favor of MCI which expressly provided that MCI recover its costs as permitted by article 5221k. No mention was made of attorney's fees as such. The District Clerk entered all three documents on June 8, 1990.

MCI filed a bill for costs on June 18, 1990 in the amount of $78,768.99, including charges of $65,862.50 representing attorney's fees paid by MCI to its counsel. On June 27, 1990, Pope filed her notice of appeal from "the District Court's Memorandum and Order entered in this cause on June 8, 1990 in which the Court granted

Defendant's Motion for Summary Judgment, denied Plaintiff's Motion to Remand and denied Plaintiff's Motion for Leave to Amend." The notice of appeal did not specifically mention either the award of costs or attorney's fees as such.

On July 18, 1990, the District Court issued its Order approving MCI's costs and attorney's fees, stating that Pope's claims were "frivolous, unreasonable and groundless." Subsequent to the above quoted notice of appeal, Pope never specifically objected to the allowance of costs or attorney's fees. Nor did she explicitly appeal this second order, or amend the notice of appeal, but argued the issue in her Brief to the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals affirmed the District Court's ruling in an Opinion filed on August 6, 1991 (Appendix "H"), and a timely Motion for Reconsideration was filed by Petitioner with said Court on August 20, 1991, which was denied September 3, 1991. (Appendix "I").

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon Supp. 1990).

Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1990).

STATEMENT OF THE CASE

The Petitioner, Brenda Pope, a black woman, appeals from the District Court's decisions refusing to remand to state Court, refusing leave to amend the pleadings a fourth time, and granting summary judgment and attorney's fees for her former employer, MCI Telecommunications Corp. in this wrongful discharge and employment discrimination action.

Pope, employed by MCI since 1980, first filed, on June 6, 1986, charges with the Texas Commission on Human Rights (TCHR) and with the Equal Employment Opportunity Commission (EEOC) alleging sexual and racial harassment and that the overall level of her pay was less than that of her white male counterparts. She then filed suit in Texas state court on May 22, 1987. She amended her state Court petition for the first time on July 8, 1987.

Subsequently, on August 3, 1987, MCI removed the litigation to Federal Court on the basis of federal question jurisdiction (discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988) and the Civil Rights Act of 1970, 42 U.S.C. § 1981 (1988) and diversity of citizenship.

Pope continued to work for MCI while the suit was pending. The removed suit was amended two more times to reflect subsequent events, including the denial of a promotion, and finally Pope's termination from employment by MCI. On or about December 13, 1988, while suit was pending, Pope applied for a promotion to the position of Regional Customer Service Manager. Another applicant, a white woman, whom Pope had alleged was less qualified, was selected on January 11, 1989.

On January 30, 1989, Pope sustained injuries to her head, lower back and right wrist in an auto accident while on company business, and she consequently was absent from work during a period of recuperation. Immediately after she sustained her job related injury, Pope gave timely notice of the injury to her employer and she began receiving workers' compensation benefits as a result of the injury. During the time that Pope was absent from work due to the injuries she sustained, her job was eliminated by Respondent's "departmental reorganization". Her position at that time was Communications Specialist Manager, and MCI eliminated one such position from the department in which Pope was employed prior to her injury (leaving one such job position which was occupied by another black woman who had been trained by Pope and who had less experience than Pope.)

Pope had reported to work on February 13, 1989, but was not permitted to remain because she did not have a full release from her physician. She returned again on March 30, 1989, after more than 42 days of absence, and was informed that MCI had no position for her, due to the "restructuring" that occurred in her absence.[1]

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1. Respondent contends its reinstatement-from-leave policy is applicable to Petitioner. The company's policy provides for reinstatement to an employee who has been "on leave" for more than 42 days only if the same or a comparable position is available. If no such position exists, an employee is to be provided up to two weeks of assistance to identify a position that the employee can fill. After this two-week period, the employee may be laid off. During Pope's absence, one of two Communications Specialist Managers Positions for Houston was eliminated, MCI decided to retain Ms. Vernetta Dickerson (a black woman) who previously worked under Petitioner's

Petitioner was terminated by MCI effective April 20, 1989 and received severance pay. On May 25, 1989, Pope initiated a timely formal claim under the Texas Workers' Compensation Act for the January 30, 1989 auto accident injuries. Her claim form is dated May 25, 1989, as is a letter from her attorney to the Industrial Accident Board stating that she had retained him to represent her before the Board.

On August 16, 1989, she filed a second charge with the TCHR, alleging that she was unlawfully denied the promotion in retaliation for the original discrimination charges and lawsuit, and that she was terminated in retaliation for filing her Workers' Compensation claim. This complaint was filed with TCHR 217 days after MCI's January 11, 1989 decision giving the promotion for which Pope had applied to an allegedly less qualified white woman. On August 18, 1989, Pope amended her pending lawsuit a second time to assert these additional, state-law causes of action, charging discrimination in violation of article 5221k of the Texas Commission on Human Rights Act[2] and wrongful termination in violation of 8307c of the Workers' Compensation Act.[3] In September 1989, in her third amended complaint, Pope expressly abandoned her federal claims, preserving only her state-law claims. The state-law claims were all that was before the federal District Court when it ruled in Respondent's favor, and assessed attorneys fees against Petitioner.

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supervision and was trained by Pope, all of which allegedly occurred following a decision to reorganize the department to permanently require only one Communications Specialist Manager.

2. Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987 & Supp. 1990).

3. Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1990).

On January 15, 1990, MCI filed its Motion for Summary Judgment. Before the District Court ruled, Pope on February 5, 1990, once again moved to remand the case to state court. The asserted basis of the remand motion was that: i) the District Court was required to remand since § 1445(c) of Title 28 forbids the removal of Workers' Compensation cases,[4] and ii) § 1447(c) required a District Court to remand where a case was removed "improvidently and without jurisdiction." [5] Pope also contended that because she no longer sought recovery under federal law, the District Court lacked subject matter jurisdiction over her state-law claims.

The District Court's docket call on this case was originally set for April 20, 1990 but rescheduled for May 11, 1990. On May 7, 1990, Pope moved for leave to amend her complaint a fourth time to introduce a common law claim of intentional infliction of emotional distress.

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4. "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." 28 U.S.C. § 1445(c) (1988).

5. "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . ." 28 U.S.C. § 1447(c) (1982).

Section 1447(c) was amended November 19, 1988 to require that a motion to remand be made within 30 days after removal:

"A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

28 U.S.C. § 1447(c) (1988) (As amended by Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, Title X, § 1016(c), 102 Stat. 4670 (1988). The act does not provide the effective date for the amendment to § 1447(c). We have joined the other courts that have considered the question in holding that it took effect November 19, 1988, the day the president signed the bill, *In re Shell Oil Co.*, 832 F.2d 1523, 1526 (5th Cir. 1991).

On June 1, 1990, the District Court denied Pope's motion to amend her complaint as untimely, and also denied the motion to remand, stating that the case was properly removable at the time it entered the federal system, and that the remaining state-law claims could be maintained on the basis of diversity. Acting on Pope's third amended complaint which asserted Texas state law causes of action for racial and sex harassment, unequal compensation, retaliatory denial of promotion, and unlawful discharge for instituting a Workers' Compensation claim, the District Court granted summary judgment in favor of MCI.

The District Court held that the Petitioner's Article 5221k claim of unequal compensation, sex and racial harassment and retaliatory denial of promotion were time-barred, under Texas Commission on Human Rights Act, and that there was no genuine issue of material fact regarding the Article 8307c claim for unlawful discharge under the Texas Workers' Compensation statute, because Pope offered no evidence of a causal link, as required by substantive Texas law, between her termination and her filing of a claim for Workers' Compensation benefits. The Fifth Circuit affirmed the ruling.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons:

I. The District Court Erred In granting Summary Judgment To The Respondent When There Existed A Material Issue Of Fact As To The Repondent's Motive For Discharging The Petitioner After The Petitioner Sustained A Job Related Injury.

II. In Granting Respondent's Motion For Summary Judgment, The District Court Erroneously Altered Petitioner's Burden Of Proof Under Substantive State Law With Respect To A Claim For Discharge In Violation Of The Texas Workers' Compensation Act.

III. Errors Of Fact And Of Law Exist In The Court's Conclusion That Appellant's Suit Was "Frivolous, Unreasonable and Groundless".

ARGUMENT

I.

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT WHEN THERE EXISTED A MATERIAL FACT AS TO RESPONDENT'S MOTIVE FOR DISCHARGING POPE.

In reviewing the District Court's ruling on the Respondent's motion for summary judgment, the Fifth Circuit should have applied the same standard that governs the District Court, *O'Neill v. Air Line Pilots Internation,* 886 F.2d 1438 (5CA 1989), and indulged every reasonable inference in favor of the party opposing the motion. *Harrison v. Byrd,* 765 F.2d 501 (5CA 1985). Summary Judgment is proper only where it appears from the pleadings, depositions, admissions, answers to interrogatories and affidavits, considered in the light most favorable to the opposing party, that there is no genuine issue regarding any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at 504. The burden of proving that there is no genuine issue of material fact is on the party moving for summary judgment.

Judson Building Co. v. First National Bank of Longview, 587 F. Supp. 852 (E.D. Tex. 1984).

The standards respecting the granting and the appellate review of summary judgment are critical in the case at bar, especially with reference to Pope's claim for unlawful discharge in violation of Texas Workers' Compensation law, because the materials before the District Court on MCI's Motion for Summary Judgment presented a genuine issue of material fact concerning the reasons and motive for Pope's termination on the heels of her job related injury. The standards pertaining to summary judgment also demonstrate that the District Court erred in its conclusion with respect to the timeliness of the filing of Pope's charge of retaliatory denial of promotion. In regard to this claim, MCI was not entitled to judgment as a matter of law because Pope was entitled, under Texas law, to a period of limitation longer than that accorded by the District Court, within which to file her charge.

This Court has recognized that summary judgment is drastic relief which must be applied with caution and that the pleadings of the party opposing summary judgment are to be liberally construed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (trial court should not act other than with caution in granting summary judgment). Accord, *Solomon v. Houston Corrugated Box Co.*, 526 F.2 389 (5CA 1976). Similarly, in an employment discrimination case, the Plaintiff need not prove a prima facie case in order to succeed in an appeal from summary judgment, but must only provide evidence that raises a genuine issue of material fact concerning each element of the plaintiff's prima facie case. See,

Waltman v. International Paper Co., 875 F.2d 468 (5CA 1989).

In the present case, the District Court improperly concluded that no genuine issue of material fact was raised by Pope's repeated contention that she was fired by MCI under the guise of a departmental restructuring immediately after her job related injury (Memorandum and Order at 10). As will be fully discussed below, Texas substantive law requires only that an employee demonstrate the Workers' Compensation Act had been triggered by a covered event or factor prior to termination. The governing state law does not require a "but for" causal showing, and Texas courts have repeatedly held that temporal proximity between the triggering of Workers' Compensation Act coverage and the claimant's discharge can satisfy the causal requirement. In effect, what the District Court did was to indulge every reasonable inference *against*, rather than in favor of, the non-movant's contention that her discharge immediately following her job related injury constituted a genuine issue of material fact under substantive state law, i.e., Texas Workers' Compensation Act, Article 8307c.

Contrary to the clear mandate of applicable precedents from Texas courts, the federal District Court chose to credit the Respondent's corporate "restructuring" evidence but discredit the Petitioner's retaliation evidence. This procedure is impermissible on a motion for summary judgment. At the summary judgment stage, the trial court may not weigh the evidence and determine the truth of the matter, but must only decide whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, supra, 447 U.S. at 249. Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from

facts are jury functions which must not be usurped by the court in ruling on a motion for summary judgment. *Id.* at 255. See also, *Honore v. Douglas,* 833 F.2d 656 (5CA 1987) (it is not the function of the trial judge in ruling on motion for summary judgment to weigh evidence, assess credibility or determine the most reasonable inference to be drawn from the evidence; rather, these functions are for the trier of fact); *Southern Distributing Co. v. Southdown, Inc.,* 574 F.2d 824 (5CA 1978) (on motion for summary judgment, the court should not assess probative value of any of the evidence in determining whether there is a genuine issue of material fact). In order to support the granting of a motion for summary judgment, the court must indulge every reasonable inference from the facts in favor of the party opposing the motion, and summary judgment must not be granted unless the record reveals no evidence from which reasonable persons might draw conflicting inferences concerning the facts. *Powers v. Nassau Development Corp.,* 753 F.2d 457 (5CA), rehearing denied, opinion clarified, 756 F.2d 1084 (5CA 1985); See also *Johnson v. United States,* 565 F. Supp. 253 (S.D. Tex. 1983) (in order to justify granting of summary judgment, evidence must permit no inferences whatsoever which would allow the nonmoving party to succeed).

Even where there is no dispute concerning the material facts, summary judgment is improper where the parties disagree regarding the material inferences to be drawn from the facts. *Winters v. Highlands Insurance Co.,* 569 F.2d 297 (5CA 1978). Moreover, even if the nonmovant fails to make a proper response showing that there exists a genuine issue of material fact, summary judgment should not be granted on those issues whose disposition

depends on resolution of evident factual conflicts not put beyond dispute by the movant's affidavit. *White v. Thomas,* 660 F.2d 680 (5CA 1981), *cert. denied,* 455 U.S. 1027 (1982). Affidavits setting forth ultimate or conclusory facts or conclusions of law are insufficient to support a motion for summary judgment. *Galindo v. Precision American Corp.,* 754 F.2d 1212 (5CA); re-rehearing denied, 762 F.2d 1004 (5CA 1985).

In the case at bar, the District Court was presented with the Petitioner's evidence which showed she had been terminated without being allowed to return to work immediately following her job related injury, and with the Respondent's evidence which purported to explain the termination based on a departmental reorganization. The Court weighed this evidence, evaluated credibility and decided which inferences should be drawn. The District Court's ruling, as erroneously affirmed by the Fifth Circuit, clearly reflects that the only inference allowed was that Petitioner was fired because her position had been eliminated. Thus, the District Court accepted completely the movant's version of the disputed facts.

Indeed, the District Court and Fifth Circuit were unwilling even to acknowledge that a reasonable opposing inference could be drawn by reasonable finders of fact, based on the Petitioner's evidence, i.e., that Petitioner's termination immediately following her job related injury might be in violation of the Texas Workers' Compensation Act. Thus, the District Court, as affirmed, went well beyond a mere determination regarding whether a genuine issue of material fact existed, and both the District and Circuit Court opinions must be reversed.

Since Respondent's Motion for Summary Judgment was premised on allegations and affidavits to the effect that

Petitioner's termination was wholly unrelated to her job related injury, but Petitioner's evidence showed that she was never allowed to work again for MCI (for even a single day) after she was injured, a genuine issue of material fact was obviously disputed and needed to be resolved by a trial on the merits, not by summary judgment, i.e., whether Petitioner's termination stemmed from reasons of a reorganization which eliminated Petitioner's position but left intact the position of a person of equal level who petitioner trained and who had less seniority than Petitioner in her position, or whether Petitioner was terminated in violation of substantive state law. Therefore, the District Court erred in granting summary judgment to Respondent under the circumstances presented by this case on the basis of the allegations presented below.

In light of the foregoing, Petitioner contends both the District Court and Fifth Circuit clearly misapplied the standards governing the granting of a motion for summary judgment. Therefore, this Court should reverse said judgment and remand this cause for trial.

II.

IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, THE DISTRICT COURT ERRONEOUSLY ALTERED PETITIONER'S BURDEN OF PROOF UNDER TEXAS LAW WITH RESPECT TO A CLAIM FOR DISCHARGE IN VIOLATION OF THE WORKERS' COMPENSATION ACT.

In the District Court, Pope asserted a claim against MCI under Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1990), alleging that at least a factor considered in her termination was that she had instituted proceedings under the Texas Workers' Compensation Act. Art. 8307c provides in relevant part:

> Art. 8307c. Protection of claimants from discrimination by employers; remedies, jurisdiction
>
> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

As the party moving for summary judgment, MCI initially bore the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Upon adequate proof of the absence of a genuine issue of material fact, the burden shifted to Pope as the nonmoving party to demonstrate the existence of the essential elements of her cause of action and the presence of a genuine issue of material fact with respect to her claim. *Id.* at 322-23. In determining whether a fact is material for purposes of a motion for summary judgment, the substantive law must be examined. *Anderson v. Liberty Lobby, Inc.*, supra, 477 U.S. at 248. It is the substantive law's determination of which facts are critical and which facts are irrelevant that governs. *Id.*

In the case at bar, the District Court misapplied Texas law as it relates to discharge in violation of Article 8307c of the Texas Workers' Compensation Act. The Court below incorrectly required Pope, in order to avoid summary judgment, to produce more proof on the causation element of her claim than is required under the governing substantive law. Under Texas law, one can establish his right to recover for wrongful discharge under Article 8307c by proof that he has been terminated due at least in part to the institution of or the filing of a Workers' Compensaion claim or where the Workers' Compensation

proceedings was a factor. One way this can be accomplished is by a showing that the instituting of claim proceedings and the termination were reasonably proximate in time. However, Texas law does not require the filing of a claim in order to trigger the coverage afforded to employees by Article 8307c of the Workers' Compensation Act. Rather, it is termination subsequent to a job related injury, where the two events are reasonably proximate in time, which gives rise to an inference of a statutorily prohibited discharge.

Thus, where the summary judgment evidence submitted by Petitioner reflects that she sustained a job related injury which necessitated her absence from work during a period of recuperation, following which she was not allowed to return to work due to a departmental restructuring by Respondent which eliminated the job Petitioner previously performed, and as a consequence Petitioner was immediately terminated, under Texas law Petitioner has raised a genuine issue of material fact as to whether the termination was in part precipitated by the on-the-job injury, and/or any step necessary to the perfection of the claim for benefits, and the District Court was precluded from granting summary judgment to Respondent MCI.

Under Texas law, an employee claiming discharge in violation of the Workers' Compensation Act has the burden of establishing a causal link between employee's discharge and the claim for Workers' Compensation benefits. *Benton v. Kroger Co.*, 640 F. Supp. 1317 (S.D. Tx. 1986); *Hughes Tool Co. v. Richards,* 624 S.W.2d 598 (Tex. App.—Houston (14th Dist.) 1981, writ ref'd n.r.e.), cert. denied, 456 U.S. 991 (1982). However, it is axiomatic that no employee can legitimately "claim"

workers' compensation benefits unless and until a job related injury is sustained. It is, therefore, the occurrence of a job related injury which triggers the coverage afforded by the Texas Workers' Compensation Act, *not* the filing of a claim for benefits.

In Petitioner's case, it was undisputed that she sustained a job related injury; nor did Respondent deny that Petitioner was continuously absent from work immediately following her injury during a period of recuperation therefrom. Respondent acknowledged that Petitioner was never allowed to return to work after said injury and Petitioner never resumed her job performance subsequent to the injury she sustained. By such evidence, the causal link had been established by Petitioner under substantive Texas law.

Of critical importance to this case is the rule followed by Texas courts that a discharged employee claiming unlawful discharge under Article 8307 does not have to establish that the discharge was *solely* because of the Workers' Compensation claim. *General Electric Co. v. Kunze,* 747 S.W.2d 826 (Tex. App.—Waco 1987, no writ); *Azar Nut Co. v. Caille,* 720 S.W.2d 685 (Tex. App.—El Paso 1986), aff'd, 735 S.W.2d 667 (Tex. 1987); *Hunt v. Van Der Horst Corp.,* 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ); *Santex, Inc. v. Cunningham,* 618 S.W.2d 557 (Tex. Civ. App.—Waco 1981, no writ). Rather, the intent of the statute is that an employer may not use the filing of a Workers' Compensaion claim as a reason to discharge or otherwise discriminate against an employee even if there are other reasons for such conduct. *Id.* at 559; see also *Azar Nut Co. v. Caille,* supra, 720 S.W.2d 687 (discharged employee need only prove that filing of Workers' Compensation claim was a determining factor in his discharge).

Accordingly, Texas courts have held under a variety of circumstances that a discharged employee has adequately proven a causal link between a claim for benefits and a subsequent discharge. In *Azar Nut Co. v. Caille,* supra, 720 S.W.2d at 686-87, the Court held that the Plaintiff former employee could recover for wrongful discharge under Article 8307c where she proved that she was injured on December 22, 1983 and was terminated on May 25, 1984. This was so despite the employer's assertions that the discharge had nothing to do with the filing of the compensation claim. *Id.* at 687.

Similarly, in *Santex, Inc. v. Cunningham,* supra, 618 S.W.2d at 559-60, the Court found the evidence "ample" to support a verdict for the Plaintiff discharged employee. After he saw a physician for treatment of a job-related injury and while he was absent due to his physical problems, the Plaintiff filed a claim for Workers' Compensation benefits. After he returned to work, the Plaintiff was criticized by the Defendant's service manager for filing the claim. *Id.* at 560.

The Plaintiff's employer became openly angry and hostile when he was awarded additional benefits at a hearing held pursuant to the Workers' Compensation Act. *Id.* After this hearing, the Plaintiff's pay was reduced and then he was discharged, allegedly because his work was unsatisfactory. *Id.* Notwithstanding the Defendant's proffered explanation for the discharge and the absence of any evidence directly linking the discharge to the claim for benefits, the Court held that the Plaintiff had adequately established a causal connection between his claim for benefits and his termination. *Id.*

To the same effect is *General Electric Co. v. Kunze,* supra, 747 S.W.2d at 829-30. In *Kunze,* the Plaintiff

former employee suffered an injury three days after he was hired, and was forced to remain away from work for three to four months. *Id.* Although his supervisors did not initially complain of his performance upon his return to work, when the Plaintiff later told his supervisor that he would have to retain an attorney in order to secure payment of his overdue medical bills by the employer's insurance carrier, his supervisors became upset and thereafter began to find fault with much of his work. *Id.* at 830. The Plaintiff was then given an unsatisfactory performance review which was never shown to him, and he was fired shortly afterwards, ostensibly because of his unsatisfactory evaluation and complaints from customers. *Id.* Despite the employer's attempted explanation for the Plaintiff's treatment, the Court held that the Plaintiff's testimony that he "believed" that he had been performing acceptably and that his discharge "might" have resulted from his injury and pursuit of a Workers' Compensation claim was sufficient evidence to support a causal connection between the claim for benefits and the discharge. *Id.*

In *Hunt v. Van Der Horst Corp.*, supra, 711 S.W.2d at 79, the Court found the evidence on the causal connection between a claim for Workers' Compensation benefits and a termination sufficient to raise a question of fact precluding summary judgment for the employer on a discharged employee's Article 8307c claim. One and one-half hours after he was injured and told his employer that he was leaving to see a doctor, Plaintiff employee was informed by his employer, that he was fired. *Id.* According to the Court, a factual question was raised regarding the reason for Plaintiff's discharge even though the employer introduced evidence indicating that it had filled out termination slips on the Plain-

tiff on prior occasions and had intended to fire him before the Workers' Compensation claim was filed. *Id.* In the Court's view, the injury and prospective claim for benefits could have been *one* reason for the Plaintiff's discharge and, under Texas law, the evidence was sufficient to raise an issue of material fact. *Id.* Importantly, the Court also stated that where the issue is one of intent, summary judgment based on affidavits of interested witnesses is improper. *Id.; see also Luna v. Daniels International Corp.*, 683 S.W.2d 800 (Tex. Civ. App.—Corpus Christi 1984, no writ) (employee's deposition demonstrating employer's hostility toward him after employee saw doctor following injury, and that supervisor "didn't want to do the paperwork or something," was sufficient to raise issue of fact precluding summary judgment for employer in action for wrongful discharge under Article 8307c, despite testimony by both parties that stated reason for employee's discharge was his failure to make timely return to work from doctor's office); *cf. Douglas v. Levingston Shipbuilding Co.*, 617 S.W.2d 718 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (if uncontradicted evidence in wrongful discharge action under Article 8307c is from an interested witness, it cannot be considered as doing more than raising an issue of fact unless it is clear, direct and positive, and there are no circumstances tending to discredit or impeach such testimony).

In light of the foregoing Texas substantive law on the point, it is clear that the District Court erred in establishing an incorrect burden of proof to be met by Petitioner merely to avert a grant of summary judgment against her. As the preceding cases indicate, a discharged employee at least raises an issue of fact by introducing evidence that he or she sustained a job related injury

of which the employer was aware, that subsequent to the injury the employee instituted proceedings under the Workers' Compensation Act and was also terminated under circumstances which factually dispute the alleged motive and intent underlying the termination.

In the present case, Respondent attempted, as have most employers in virtually every Article 8307c case decided in Texas, to justify Petitioner's peremptory and unanticipated termination. Petitioner, however, introduced evidence which showed a close temporal proximity between the job related injury covered under Texas Workers' Compensation law and her discharge. Petitioner also demonstrated the circumstances of her departure from the Respondent's job (which included Petitioner being ushered from the Respondent's job premises when she attempted to report for her first full day of work following the filing of a claim for benefits under the Workers' Compensation Act). Petitioner further contended that the employer's rationale for and implementation of a departmental restructuring, which eliminated the job Petitioner previously performed, during her absence for recuperation from her job related injury indicated hostility on the part of her former employer. Hence, the District Court erred in holding that no genuine issue of material fact was presented and in awarding summary judgment to Respondent on Petitioner's Article 8307c cause of action under substantive Texas law.

Respondent's assertion of a "company practice" is also insufficient to disprove that a termination subsequent to a job related injury created a genuine issue of material fact as to whether such conduct by the employer was unlawful under Article 8307c, Texas Workers' Compensation Act. Nonetheless, the District Court attempted

to support its ruling by citing Respondent's leave of absence and reinstatement policies as a legitimate basis for denying that a genuine issue of material fact was in dispute. Neither the Respondent's nor the Court's "legitimate business reason" argument can overcome the most obvious error present in the Court's ruling, to-wit: acceptance of this argument means the District Court has refused to indulge every reasonable inference in favor of the party opposing summary judgment. At least to the extent that the District Court supported its ruling by citing Respondent's leave of absence and reinstatement policies, the Court ignored the fact that Petitioner was not on a leave of absence, but recuperating from a job related injury. Pope's discharge was illegal if *one* of the reasons for her termination was related to her job related injury.

It cannot seriously be contended that the mere existence of an employer's formal reinstatement policy can serve to legitimize all terminations allowed by that policy following a claim for Workers' Compensation benefits. In most of the Texas cases holding a discharge wrongful under Article 8307c, the employer has made an attempt to clothe the discharge as proper under some provision of its "policy". In *Murray Corp. of Maryland v. Brooks,* 600 S.W.2d 897 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.), the Plaintiff former employee was discharged following a claim for Workers' Compensation benefits for a severe job-related back injury. This claim was preceded two months earlier by another claim arising from an unrelated injury. *Id.* at 900. Following the Plaintiff's surgery, he was granted a six-month leave of absence. *Id.* The Defendant employer had a formal, written policy which allowed the employer to extend the Plaintiff's employment after six months absence, or to terminate him

if he had not returned by that time. *Id.* at 901. Following his six-month leave, the Plaintiff was terminated, assertedly pursuant to this policy. *Id.* at 900. The Plaintiff then sued for wrongful discharge under Article 8307c. *Id.* at 898. In addition to its leave of absence policy, the Defendant offered as an explanation for the Plaintiff's termination the fact that it had undertaken a restructuring of operations in response to a severe reduction in business. *Id.* at 901-02. Despite the employer's reliance on company practice and policy, and external economic circumstances, to justify its treatment of the Plaintiff, the Court held that the evidence was sufficient to avoid an instructed verdict and judgment n.o.v. for the employer, where everyone present at the manager's meeting during which the decision was made to terminate the Plaintiff "knew (the Plaintiff) was making Workers' Compensation claims, and that payment of Workers' Compensation claims by the insurance company would raise Murray's insurance rates." *Id.* at 903.

In the case at bar, Petitioner had not only sustained a job related injury, but also had been receving Workers' Compensation benefits for several months prior to her termination. Indeed, Respondent's alleged "departmental reorganization" which was implemented during the Petitioner's period of recuperation, resulted in only one position being eliminated—the Petitioner's— and allowed Respondent to retain a less qualified employee whom Petitioner had trained! The mere fact that Respondent had a leave of absence and reinstatement policy which might have allowed Petitioner's termination, under other circumstances, cannot serve to insulate Respondent from liability under Article 8307c if there is evidence tending to show that one of the reasons for Petitioner's discharge was her job related injury and institution of a claim for Workers'

Compensation benefits. Petitioner was receiving Workers' Compensation benefits at the time of her discharge, and she had never been permitted to return to work subsequent to her job related injury. As such, the summary judgment evidence offered by Petitioner raised a genuine issue as to the cause of her discharge. Therefore, the District Court erred in its ruling, and its judgment, as well as that of the Fifth Circuit, must be reversed.

III.

ERRORS OF FACT AND OF LAW EXIST IN THE COURT'S CONCLUSION THAT APPELLANT'S SUIT WAS "FRIVOLOUS, UNREASONABLE AND GROUNDLESS".

Errors of fact exist to the extent the District Court concluded ". . . [Petitioner] came to Court with untimely claims of discrimination under state law, unreasonably ignoring Texas time limitations." Although the District Court correctly stated that the employee's initial charge of discrimination against Respondent was filed on June 6, 1986 with the Texas Commission on Human Rights ("TCHR"), the Court erroneously stated that Petitioner "filed suit in Texas state court on June 8, 1987 . . .", since Petitioner's Original Petition in the Texas state court was originally filed on May 22, 1987. This cause was subsequently removed by Respondent to federal District Court, and the state District Court Clerk's Office apparently did not include the original petition in the record of the case transmitted to the federal District Court Clerk's Office, only the last amended petition which was on file. Upon discovery of the mistake regarding original filing date which was evidenced in the District Court's Memorandum granting summary judgment in Respond-

ent's favor, Petitioner made diligent efforts to correct this crucial error in the record on appeal to the Fifth Circuit. However, the Fifth Circuit's Opinion affirming the District Court's ruling has wholly ignored this glaring factual error and its substantial effect on the statute of limitations applied against Petitioner as justification for the award of attorneys' fees to Respondent. For ready reference by this Court, a true and correct copy of the original TCHR "Charge of Discrimination" filed by Petitioner on June 6, 1986, is included as Apuendix "A" and incorporated herein by this reference for all purposes. This document was a part of the Record on appeal in this case and was also attached as Appendix "A" to the Third Amended Complaint on which the District Court entered summary judgment against Petitioner.

Further, a copy of the "Plaintiff's Original Petition" filed by Petitioner on May 22, 1987 in the Harris County, Texas, District Clerk's Office, reflecting the date file stamp of said office, is also included for ready refence by the Court, marked as Appendix "B", and incorporated herein by this reference for all purposes. This original petition should also have been a part of the Record which was transferred to the Fifth Circuit Clerk's Office in connection with this appeal.

In the original TCHR complaint filed June 6, 1986, Petitioner alleged not only (1) that she was the victim of employment discrimination because of her race and sex, but also (2) that "Black females are being discriminated against as a class in regard to discharge."

Further, although the District Court correctly noted that the Petitioner's second charge of discrimination against Respondent was filed on August 16, 1989 with the Texas Commission on Human Rights ("TCHR"),

alleging that Petitioner was unlawfully denied a promotion in retaliation for the original discrimination charges and lawsuit, the District Court has erroneously stated that Petitioner also alleged in said charge "that she was terminated in retaliation for filing her Workers' Compensation claim."

For ready reference by this Court, a true and correct copy of the second TCHR "Charge of Discrimination" filed by Petitioner on August 16, 1989 is included, marked as Appendix "C", and incorporated herein by this reference for all purposes.

Specifically, in her second TCHR complaint filed August 16, 1989, Petitioner alleged (1) that she had been denied promotion based on an event which occurred on January 11, 1989, and (2) that "I was terminated on or about March 29, 1989 allegedly because my position was being eliminated. I am convinced that the failure to promote in January 1989 and my ultimate termination in March 1989 was all retaliation against me for engaging in a protected activity."

It was Petitioner's Third Amended Complaint, filed September 25, 1989, in which the allegations of retaliatory discharge in violation of Article 8307c of the Texas Workers' Compensation Act was pleaded as an alternative to Petitioner's allegation of termination in violation of the Texas Human Rights Act, Section 5221k. A true and correct copy of the Third Amended Complaint, filed September 25, 1989, is included, marked as Appendix "D", and incorporated herein.

As evidenced by the above referenced documents, the District Court's Opinion contains substantial errors of fact which have resulted in the District Court reaching in-

correct conclusions of law regarding the timeliness of Petitioner's claim of discrimination. Specifically, (a) Petitioner did comply with the Texas time limitations which require that suit be filed within one year after the date on which a charge of discrimination is filed with TCHR (original charge filed June 6, 1986 and suit was filed May 22, 1987), and (b) Petitioner did file a timely charge of retaliatory discharge on August 16, 1989 (complaining of discharge which occurred on March 29, 1989) and thereafter Petitioner made a timely amendment of her pleading on September 25, 1989 making the allegation of discharge in retaliation for having previously filed a complaint of race/sex discrimination.

Petitioner's claims are not frivolous, groundless and unreasonable. At the very least, her Workers' Compensation claims, as argued earlier in this Brief, present serious questions of fact and law on which reasonable minds could disagree. Petitioner's suit was filed timely, in good faith, and is not so lacking in merit as to be utterly groundless as suggested by the Court below.

The question presented by the attorneys' fee controversy in this case is precisely the issue considered by the Supreme Court in *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978). Unfortunately, neither the District Court nor the Fifth Circuit adhered to the Supreme Court's admonition to ". . . resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because [Petitioner] did not ultimately prevail, [her] action must have been unreasonable or without foundation." *Id.* at 422.

The rulings by the District Court and Fifth Circuit, in this case, will have the effect of discouraging all but the most airtight claims, for no other litigants could be

assured of ultimate success. *Id.* Such a result is especially repressive in the Petitioner's circumstances, since there were no Texas cases addressing the standard by which attorneys' fees are to be awarded under Article 5221k, Section 7.01(e). Moreover, for the reasons discussed hereinabove, Petitioner proceeded in this litigation in a timely fashion, with an honest belief that she had been the victim of discrimination. In addition to the Petitioner's claim against Respondent based on discriminatory employment practices and subsequent retaliation, Petitioner also demonstrated facts sufficient to make a prima facie showing of retaliatory discharge under substantive state law, Article 8307c, Texas Workers' Compensation Act.

However, as a result of the trial Court's abuse of its discretionary authority in granting the Respondent's Motion for Summary Judgment, Petitioner has now been subjected to an onerous award of attorneys' fees, post judgment, which the Fifth Circuit has ruled are not appealable herein. For the reasons discussed earlier, the Fifth Circuit's opinion sustaining the award of attorneys' fees is based on substantial errors of fact and of law, the full effect of which is to make it more difficult for a plaintiff of limited means, such as Petitioner, to bring a meritorious suit.

Texas Commission on Human Rights Act, Tex. Rev. Civ. Stat. Ann., Article 5221k states under Section 1.20(2) that among the purposes of the legislation is to secure for all persons within the State of Texas full freedom from discrimination in certain transactions regarding employment.

Petitioner's claims were not frivolous, groundless and unreasonable, but were filed in good faith, and not so

lacking in merit as to be utterly groundless as suggested by the District Court, whose Order must be reversed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decisions of the District Court and the United States Court of Appeals for the Fifth Circuit in this matter.

DATED: _____

Respectfully submitted,

GORDON R. COOPER, II

PERNILA S. BROWN

Attorneys for Petitioner

COOPER, COOPER & BROWN, P.C.
Attorneys at Law
2626 South Loop West,
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Houston, Texas 77054
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Fax: 713/665-7086

APPENDIX A

PLAINTIFF'S EXHIBIT "A"

CHARGE OF DISCRIMINATION

Charge Number:

EEOC 064862304

Texas Commission on Human Rights and EEOC

Name:

Ms. Brenda J. Pope

Home Telephone No.

(713) 664-5116

Street Address:

6245 Renwick, #4446

City, State and Zip Code:

Houston, Texas 77081

County:

Harris

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, State or Local Government Agency who discriminated against me.

Name:

M. C. I. Telecommunication

No. of Employees/Members:

250

Telephone Number:

(713) 850-1003

Street Address:

5444 Westheimer, 9th Floor

City, State and Zip Code:

Houston, Texas 77057

Cause of Discrimination Based On:

Race

Date Most Recent or Continuing Discrimination Took Place:

2-15-86 and Continuing

The Particulars Are:

I. I have been paid lower wages, harassed, denied an evaluation, threatened with termination, forced to take vacation time off instead of using my sick leave, have been subjected to derogatory remarks and have been accused of not being ill. Respondent is engaged in the telecommunication business and employs 250 employees. I was employed on July 21, 1980.

II. I believe I have been discriminated against because of my sex, female, and race, Black, in that:

1. I have been paid lower wages than David Shepherd, Sheldon Tuffyas, and Jim Cragg, Caucasian males, Managers.

2. Since February 15, 1986, I have been harassed by Arnold Salinas, male, Mexican-American, Senior Manager.

3. Mr. Salinas has never asked David Shepherd, Sheldon Tuffyas, and Jim Cragg to take vacation days instead of using their sick leave, they are not subjected to derogatory remarks, and their evaluations denied or postponed.

IV. CLASS: It is my belief that Black females are being discriminated against as a class in regard to discharge.

Debra Cox and Sharon Smith, Managers; Patricia Mack, Supervisor; Doreen Reeves, Staff Administrator; Jan Lawson, Sales Representative; Paula Settles, Sales Service Representative, all Black females, have been discharged and replaced by Caucasian males.

I also want this charge filed with the EEOC.

I will advise the agencies if I change by address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ BRENDA POPE
Charging Party

Date:

6/6/86

APPENDIX B

CAUSE NO. 87-024016

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
127TH JUDICIAL DISTRICT

BRENDA POPE
Plaintiff

v.

MCI TELECOMMUNICATIONS
Defendant

(Filed May 22, 1987)

PLAINTIFF'S ORIGINAL PETITION

COMES NOW, BRENDA POPE, hereinafter referred to as Plaintiff, complaining of MCI TELECOMMUNICATIONS, hereinafter referred to as Defendant. In support of her cause, Plaintiff would show unto the Court and Jury the following:

I.

Plaintiff, BRENDA POPE, at all times relevant to this cause of action is a resident of Harris County, Texas. Defendant, MCI, is a foreign corporation (Delaware), licensed to do business in the State of Texas. Service may be perfected on Defendant through its agent for services: C.T. Corporation Service, 416 Littlefield Building, Austin, Texas 78701.

II.

Plaintiff would show this Court that she was employed by Defendant on or about July 21, 1980 in the position of CRT Operator.

Plaintiff will show that although she has received several promotions, she is being paid lower wages than her male counterparts, at all times material to this cause of action all white males who function in the same or similar capacity as Plaintiff. Further that on account of Defendant's illegal conduct her career development has been substantially harmed and/or damaged.

* * *

VII.

Plaintiff would show that this is a case where exemplary damages or punitive damages may be awarded. That because of the nature of the offenses committed against her by the Defendant, including the intentional illegality of their conduct and oppression, the deliberate infliction of mental and emotional pain and distress upon her and reckless and wanton and deliberate actions taken by the Defendant against the Plaintiff and the careless disregard of the Plaintiff's rights and for reasons at law, Plaintiff is entitled to recover exemplary or punitive damages in addition to actual damages, and such punitive or exemplary damages should be in the sum of at least Two Hundred Fifty Thousand ($250,000.00) dollars which she now sues so that this Defendant will not again engage in conduct made illegal by this state and nation.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that this Court advance this cause to the docket, order a speedy hearing on this action according to law, and after hearing, enter an Order granting judgment against the Defendant as follows:

a. For compensatory damages in excess of the minimum jurisdictional limit of this court.

b. For punitive damages in a sum in excess of Two Hundred Fifty Thousand ($250,000.00) dollars;

c. For reasonable attorney's fees; and

d. For all costs of suit expenses incurred in prosecuting the cast, and such further relief as the Court may deem appropriate.

Respectfully submitted,

COOPER & COOPER
4103 La Branch Street
Houston, Texas 77004
(713) 630-0030

/s/ GORDON R. COOPER
GORDON R. COOPER, II
State Bar No. 04785000

APPENDIX C

PLAINTIFF'S EXHIBIT "C"

CHARGE OF DISCRIMINATION

Charge Number:

1890170-H-31C890581

Texas Commission on Human Rights and EEOC

Name:

Ms. Brenda J. Pope

Home Telephone No.

(713) 726-1049

Street Address:

7635 Teal Run Drive

City, State and Zip Code:

Houston, Texas 77071

County:

Harris

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, State or Local Government Agency who discriminated against me.

Name:

M. C. I. Telecommunications

No. of Employees/Members:

250

Telephone Number:

(713) 850-1003

Street Address:

5444 Westheimer, 9th Floor

City, State and Zip Code:

Houston, Texas 77057

Cause of Discrimination Based On:

Retaliation

Date Most Recent or Continuing Discrimination Took Place:

January 1989 and March 1989

The Particulars Are:

I was retaliated against because of my pending lawsuit (Ttitle VII) against the respondent.

On July 1987, I filed a lawsuit against MCI alleging race and sex discrimination wherein I alleged that I was paid less than my white male counterparts and that I was being harassed by my supervisors.
During the course of the aforementioned litigation, I have been retaliated against as follows:

1. In January 1989 I was denied a promotion to position of Regional Manager of Customer Service for South Texas. Nancy Labberz, a white female with less experience, (whom I once supervised) was given the position.

2. I was terminated on or about March 29, 1989 allegedly because my position was being eliminated.

I am convinced that the failure to promote in January 1989 and my ultimate termination in March 1989 was all retaliation against me for engaging in a protected activity.

I also want this charged filed with the EEOC.

I will advise the agencies if I change by address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ BRENDA POPE
Charging Party

Date:

August 16, 1989

Received:

Texas Commission of Human Rights

August 18, 1989

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-2456

PLAINTIFF DEMANDS A TRIAL BY JURY

BRENDA POPE,
Plaintiff,

v.

MCI TELECOMMUNICATIONS,
Defendant.

(Filed September 25, 1989)

PLAINTIFF'S THIRD AMENDED COMPLAINT

COMES NOW, BRENDA POPE, hereinafter referred to as Plaintiff, and files this her Third Amended Complaint wherein she is complaining of MCI TELECOMMUNICATIONS CORPORATIONS, hereinafter referred to as Defendant. In support of her cause of action Plaintiff would show unto the Court and Jury the following:

I.

That Plaintiff is a black female who at all times relevant to this cause of action was a resident of Harris County, Texas. That Defendant, MCI, is a Delaware Corporation authorized by law to do business in the State of Texas. Service of process has been previously perfected on this Defendant.

II.

JURISDICTION

Plaintiff filed her initial charge of discrimination with the Equal Employment Opportunity Commission on or about June 6, 1986 and received her Right to Sue on the aforementioned charge from the Texas Commission on Human Rights on or about April 10, 1987. Plaintiff timely filed her original lawsuit on or about June 8, 1987. Plaintiff filed her second charge of discrimination with the Texas Commission on Human Rights on or about August 18, 1989, and on or about September 21, 1989 Plaintiff received a Notice of Right to Sue and therefore with this amended Petition has timely brought this matter before this Honorable Court. Plaintiff's initial charge of discrimination is incorporated by reference in this Petition and is marked and attached hereto along with the Right to Sue as Exhibit "A" and "B" respectively. Plaintiff's second charge of discrimination is incorporated by reference in this Petition and is marked and attached hereto along with the Right to Sue as Exhibit "C" and "D" respectively.

III.

Plaintiff would show that she was initially employed by Defendant on or about July 21, 1980 in the position of CRT Operator.

That while working for the Defendant and at all times material to this cause of action, although Plaintiff received several promotions, Plaintiff was paid lower wages than her white male counterparts, who function in the same or similar capacity as Plaintiff, all to her damage and is in violation of the Texas Commission on Human Rights Act for which Plaintiff now sues.

IV.

Plaintiff will show that while employed by the Defendant she was subject to on-the-job harassment, such as verbal abuse by Senior Manager Arnold Salinas and denied the right/privilege enjoyed by all other employees to use sick time when ill, even though Plaintiff had unused sick time available.

Plaintiff would show this Court that the unfair and illegal acts of Defendant enumerated above and others not specified were done intentionally and purposefully, and that such acts were perpetrated against Plaintiff on account of her sex and race all to her damage and in violation of the Texas Commission on Human Rights Act for which Plaintiff now sues.

V.

Plaintiff would show that on or about December 13, 1988 Plaintiff applied for the position of Regional Customer Service Manager. That Plaintiff was qualified for the position, that Plaintiff sought the position while it was vacant and that a white female with less qualifications than Plaintiff was selected for the position on or about January 11, 1989.

Plaintiff would show that the denial of the position she sought as aforesaid would have been a promotion and that Defendant's denial of the position sought was in retaliation against her for having filed a previous charge of discrimination with the Texas Commission on Human Rights all to Plaintiff's damage for which Plaintiff now sues.

Plaintiff would further show that the availability of positions in management are purposefully secreted by

Defendant in violation of the Texas Commission on Human Rights Act as the aforementioned position was not posted in the Houston area office where Plaintiff was assigned. Plaintiff would show that she worked in an environment where when persons apply for positions without the "tacit approval" of Management, they are rebuffed and marked as trouble makers. Defendant's promotion procedures as maintained by the Defendant are designed so that Defendant can engage in illegal discrimination and are in violation of the Texas Commission on Human Rights Act all to her damage for which Plaintiff now sues.

VI.

Pleading further, Plaintiff would show, that as a consequence of her ongoing employment discrimination lawsuit and application for promotion Defendant terminated Plaintiff on or about March 29, 1989. Plaintiff would show that one of the determining factors in Defendant's termination of Plaintiff's employment was that she was engaging in a protected activity and her assertion that she should have an Equal Employment Opportunity as are provided for by the laws of this State. That Defendant's act of denying Plaintiff a promotion and terminating Plaintiff was in violation of the Texas Commission on Human Rights Act and in careless and reckless disregard for Plaintiff's rights as protected by the State of Texas all to Plaintiff's damage for which Plaintiff now sues.

VII.

Pleading in the alternative, Plaintiff would show Defendant violated the Texas Workers' Compensation Statute, Section 8307c in that on January 30, 1989, Plaintiff sustained injury while she was performing her duties and

while she was acting within the course and scope of her employment.

Plaintiff would show that under and by virtue of the Workers' Compensation laws of the State of Texas, she instituted proceedings to claim Worker's Compensation Benefits in good faith all according to the rules of the Industrial Accident Board for the State of Texas.

Plaintiff would further show that prior to her termination she had been advised by her physician that she could return to work on March 30, 1989 but Defendant did not allow Plaintiff to return to work and Plaintiff was terminated on March 29, 1989 while still under the doctor's supervision and while still receiving treatments for her course and scope injury all to Plaintiff's damage for which she now sues.

VIII.

Plaintiff would further alternatively show that at all times prior to the onset of her occupational injury and advising her employer of her condition, she was an able, full-time employee of the Defendant. Plaintiff would further show that prior to her occupational injury her employer had not indicated to her that her work was unsatisfactory and Plaintiff alleges that her work was at all times in accordance with the instructions given her by her immediate manager and/or the manager in her assigned work area.

IX.

Plaintiff would further show to this Court that one of the reasons she was terminated was because she lawfully instituted proceedings to collect her Workers' Compensa-

tion benefits according to the rules of the Industrial Accident Board of the State of Texas. Plaintiff would further show that she instituted proceedings in good faith and has attempted to have her claim processed in good faith. That the Defendant acted in a discriminatory and hostile manner toward her and as a retaliatory act against her because she instituted proceedings to claim Worker's Compensation Benefits.

Plaintiff would show that her employer's actions were in violation of Article 8307c of the State of Texas which prohibit an employer from discriminating against an employee for instituting Worker's Compensation proceedings. Plaintiff would further show that the statutes provide for all damages Plaintiff can prove as a result of the actions taken against her for which Plaintiff now sues.

Plaintiff would show this Court and Jury that as a result of the wrongful conduct of Defendant, the Defendant company is obligated, pursuant to the provision of Article 8307c Section 2, to reinstate Plaintiff to a position and award her damages as before prayed and for which Plaintiff now sues.

X.

Further, Plaintiff would show that as a consequence of the conduct of the Defendant complained of herein this Plaintiff has sustained economic loss for which she now sues. Additionally this Plaintiff has also suffered embarassment, feeling of shame, and indignity. She has suffered mental and emotional pain and distress generally and this Plaintiff has been actually damaged by the Defendant in the sum in excess of the minimum jurisdictional limits of this Court, for which she now sues pursuant to Article 8307c of Texas Civil Statute.

XI.

Plaintiff would show that this is a case where exemplary damages or punitive damages may be awarded. That because of the nature of the offenses committed against her by the Defendant, including the intentional illegality of their conduct and oppression, the deliberate infliction of mental and emotional pain and distress upon her and reckless and wanton and deliberate actions taken by the Defendant against the Plaintiff and the careless disregard of the Plaintiff's rights and for reasons at law, Plaintiff is entitled to recover exemplary or punitive damages in addition to actual damages, and such punitive or exemplary damages should be in the sum of at least Five Hundred Thousand ($500,000.00) Dollars for which she now sues so that this Defendant will not again engage in conduct made illegal by the state of Texas.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that this Court advance this cause to the docket, order a speedy hearing on this action according to law, and after hearing, enter an Order granting judgment against the Defendant as follows:

a. For compensatory damages and damages for Plaintiff's mental and emotional distress in excess of the minimum jurisdictional limit of this Court;

b. For punitive damages in a sum in excess of Five Hundred Thousand ($500,000.00) Dollars;

c. For reasonable attorney's fees;

d. For reinstatement and for promotion to the position Plaintiff was denied with full benefits and seniority; and

e. For all costs of suit expenses incurred in prosecuting the case, and such further relief as the Court may deem appropriate.

Respectfully submitted,

COOPER & COOPER, P.C.
Attorneys at Law
4103 La Branch Street
Houston, Texas 77004
(713) 630-0030

/s/ GORDON R. COOPER, II
Gordon R. Cooper, II
Admission No. 1971

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, Gordon R. Cooper, II, do hereby certify that a true and correct copy of the foregoing instrument was sent Certified Mail, Return Receipt Requested to Kerry Notestine, Bracewell & Patterson, 2900 South Tower Pennzoil Place, Houston, Texas 77002 on this the 22nd day of September, 1989.

/s/ GORDON R. COOPER, II
Gordon R. Cooper, II

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-2456

BRENDA POPE,
Plaintiff

v.

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant

Filed June 8, 1990

MEMORANDUM AND ORDER

Pending before the Court are the Motion for Summary Judgment of defendant (#29) and the Motion to Remand of plaintiff (#32) in the above-captioned and numbered cause. After reviewing the motions and the various arguments of counsel, the Court is of the opinion that the Motion to Remand should be denied, and that the Motion for Summary Judgment should be granted.

On June 6, 1986, plaintiff filed a charge of discrimination against her employer, MCI Telecommunications Corporation ("MCI"), with the Texas Commission on Human Rights ("TCHR") and the Equal Employment Opportunity Commission ("EEOC") based upon unequal compensation and racial harassment. Plaintiff received a "Notice of Right to file Civil Action" from the TCHR dated April 8, 1987. Plaintiff then filed her Original Petition in state court on June 8, 1987. She filed her First Amended Petition in state court on July 8, 1987.

MCI removed the case to this Court on August 3, 1987, asserting the existence of both federal question and diversity jurisdiction. Plaintiff filed her Second Amended Complaint in this Court, clarifying that her federal question claims arose under Title VII and 42 U.S.C. § 1981.[1] In this Court, plaintiff has asserted State Law claims under article 5221k,[2] for racial harassment, unequal compensation, and denial of promotion and under article 8307c, for termination from employment in retaliation for filing a workers' compensation claim. In her Third Amended Complaint, plaintiff dropped her federal claims. In its present posture, therefore, this lawsuit involves two state law claims arising under articles 5221k and 8307c of the Texas Revised Civil Statutes Annotated, and involves no claims arising under federal law.

I. PLAINTIFF'S MOTION TO REMAND

Plaintiff urges that, since she no longer asserts federal causes of action, this case should be remanded to state court. Plaintiff argues that 28 U.S.C. § 1445(c) mandates remanding her article 8307c claim. Section 1445(c) provides: "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." There is ample authority for the proposition that § 1445 (c) bars the removal of article 8307c claims.[3] In addi-

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1. Plaintiff's First Amended Petition merely alleged that defendant denied plaintiff "the same rights to make and enforce employment contracts as that offered her white male co-worker." First Amended Petition at 2, ¶ V. Interpreting this as a reference to 42 U.S.C. § 1981, defendant removed on the basis of federal question jurisdiction, and also asserted the existence of diversity jurisdiction.

2. Neither the Original Petition nor the First Amended Petition specifically referred to article 5221k of the Texas Revised Civil Statutes annotated, upon which plaintiff's claims of unequal compensation and racial harassment are based.

tion, plaintiff cites an Order of the Honorable James De-Anda remanding a case in which the only cause of action was under the Texas Human Rights Act.[4]

This Court is of the opinion that plaintiff's Motion to Remand should be denied. Generally, "the jurisdiction of the federal courts over a properly removed action will not be defeated by later developments in the suit." 14A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3739, at 582 (2d ed. 1985). Removal of this case was proper at the time of removal because of the presence of both federal question and diversity jurisdiction. 28 U.S.C. § 1445(c) bars removal of article 8307c claims. The article 5221k and article 8307c claims were added after removal. This case is thus distinguished from cases in which non-removable claims are removed. Moreover, this Court cannot remand a case when the only claims in it were never removed. Although plaintiff dropped her federal claims, her state law claims may still be maintained on the basis of diversity jurisdiction.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. *Summary Judgment Standard*

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleadings, depositions, ans-

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3. *See Soto v. Tonka Corp.*, 716 F. Supp. 977 (W.D. Tex. 1989); *Wallace v. Ryan-Walsh Stevedoring Co.*, 708 F. Supp. 144 (E.D. Tex. 1989); *De Santos v. P*I*E Nationwide, Inc.*, No. EP-86-CA-49 (W.D. Tex. April 14, 1986) (WESTLAW/LEXIS); *Fernandez v. Reynolds Metals Co.*, 384 F. Supp. 1281, 1283 (S.D. Tex. 1974). *But see Richardson v. Owens-Illinois Glass Container, Inc.*, 698 F. Supp. 673 (W.D. Tex. 1988).

4. *Reece v. St. Joseph Hosp.*, No. H-87-2177 (S.D. Tex. January 27, 1988).

wers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 106 S. Ct. 2548, 2553 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams,* 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.,* 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex,* 106 S. Ct. at 2552-53. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2514 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Management*

Serv., 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 106 S. Ct. at 2513. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-57 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987).

B. *Plaintiff's Article 5221k Claims*

1. *Unequal Compensation and Racial Harassment.* Article 5221k, § 7.01(a) grants a statutory cause of action to discrimination complainants following the issuance of notice by the TCHR. Tex. Rev. Civ. Stat. Ann. art. 5221k, § 7.01(a) (Vernon Supp. 1990). Defendant's motion urges that plaintiff failed to file suit under article 5221k within the time prescribed by statute. Article 5221k, § 7.01(a) provides that suit must be brought within sixty days following the receipt of the notice by the complainant. There is much debate among the parties concerning whether plaintiff in fact asserted her claims of unequal compensation and racial harassment under

article 5221k within the sixty-day time period, depending upon the construction of her state court pleadings.

Notwithstanding this debate, plaintiff's claims of unequal compensation and racial harassment fail for other reasons. Section 7.01(a) provides that "[i]n no event may any action be brought pursuant to this article more than one year after the date of filing of the complaint to which the action relates." *Id.* In *Green v. Aluminum Co. of America,* 760 S.W.2d 378, 380 (Tex. App.—Austin 1988, no writ), the court clearly held that the one-year limitation period is jurisdictional and mandatory and cannot be excused by an agency's failure to give a party notice. It is clear that plaintiff filed her charge of discrimination alleging unequal compensation and racial harassment on June 6, 1986, and filed her Original Petition in state court on June 8, 1987. Plaintiff, therefore, failed to file suit within the one-year limitation period, regardless of whether her state court pleadings are construed as to assert a cause of action under article 5221k. Defendant is entitled to summary judgment on plaintiff's claims for unequal compensation and racial harassment under article 5221k.

2. *Denial of Promotion.* Defendant also contends that plaintiff's claim of retaliation in denial of promotion under article 5221k was untimely filed. Article 5221k, § 6.01(a) requires that complaints be filed within 180 days of the date the alleged unlawful employment practice occurred. It is undisputed that plaintiff was denied a promotion on January 11, 1989, and did not file a charge concerning this claim until August 16, 1989, some 217 days after the alleged discriminatory event. Plaintiff, however, contends that the 300-day filing period applicable to claims under Title VII is available.

Plaintiff cites Fifth Circuit authority for this proposition: *Urrutia v. Valero Energy Corp.*, 841 F.2d 123 (5th Cir. 1988), *cert. denied,* 109 S. Ct. 82; *Mennor v. Fort Hood National Bank,* 829 F.2d 553 (5th Cir. 1987). Generally, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. The time limit, however, is 300 days if the complainant initially institutes proceedings with a state or local authority with authority to grant or seek relief from the practice charged. 42 U.S.C. § 2000e-5(e). The extended time limitation, however, applies to charges filed with the EEOC under Title VII. In this case, however, it is undisputed that plaintiff's claim of denial of promotion was filed under article 5221k rather than under Title VII. Therefore, the 180-day limitation period applies. Since plaintiff failed to file a charge on her claim for denial of promotion within 180 days of the denial of her promotion, this claim is untimely. Defendant is entitled to summary judgment on plaintiff's denial of promotion claim under article 5221k as well.

C. *Plaintiff's Article 8307c Claim*

Plaintiff's article 8307c claim arises out of the termination of her employment with MCI. Article 8307c provides, in relevant part:

> No person may discharge or in any manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or cause to be instituted, in good faith, any proceeding under the Texas Workmens' Compensation Act, or has testified or is about to testify in any such proceeding.

Tex. Rev. Civ. Stat. Ann. art. 8307c, § 1 (Vernon Supp. 1990). Defendant contends that it is entitled to summary

judgment on this claim because it did not, in fact, violate article 8307c when it terminated plaintiff.

This Court's task, as stated above, is to view the summary judgment evidence in the light most favorable to plaintiff. Plaintiff sustained an on-the-job injury on January 30, 1989. She was initially released to return to work for half days only,[5] and returned on February 13, 1989, in spite of the fact that her physician advised against returning to work at all. When she arrived, MCI's Personnel Manager instructed her to return home until she was fully released to return to work. Plaintiff was subsequently fully released on March 29, 1989.

Plaintiff returned to work on March 30, 1989. When she arrived, she was informed that her position had been eliminated and that her services were no longer needed.[6] She left the premises and was given $15,000 in severance pay. Later, plaintiff received a letter dated April 17, 1989, informing her that MCI had a two weeks' assistance program to help her find a new position according to company policy, and that this period had ended on April 14, 1989. She now claims that MCI terminated her for filing a workers' compensation claim in violation of article 8307c.

MCI has a leave of absence policy which provides reinstatement to an employee on leave of absence for 42 days or less. Reinstatement to employees on leave

5. Plaintiff contends that she was released for light duty. MCI correctly points out, however, that her initial release made no reference to light duty. This conflict is irrelevant to this Court's holding.

6. Her position was eliminated because of the restructuring of the Communications Specialist functional area in the Southwest Division of MCI, which resulted in the elimination, creation, and consolidation of certain positions.

in excess of 42 days is available only if the same or comparable position is available. An employee is provided up to two weeks of assistance in identifying a position upon seeking reinstatement. After this two week period, an employee may be terminated.[7]

In order to prevail on an article 8307c claim, a plaintiff must show that discrimination for filing a workers' compensation claim was a determining factor in the discharge. *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987); *Hughes Tool Co. v. Richards*, 624 S.W.2d 598 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.), *cert. denied*, 456 U.S. 991 (1982). A plaintiff need not show that he or she was discharged solely because of the claim. Rather, the claimant must show a causal connection between the discharge and the claim for workers' compensation benefits. Once the link has been established, the employer must rebut the alleged discrimination by showing there was a legitimate reason behind the discharge. *Id.* at 599.

Plaintiff has failed to raise a genuine issue of material fact to support her article 8307c claim. Plaintiff's argument in her response to the motion boils down to her contention that her filing a workers' compensation claim was a determining factor in her termination simply because she was terminated after filing a claim. This contention fails to raise a genuine issue that a causal link exists as required and does not tend to show discriminatory intent.

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7. Plaintiff contends that she was not informed of the two week assistance program. Even if true, this is irrelevant to the Court's holding.

On the other hand, the undisputed summary judgment evidence adduced by MCI demonstrates that the Customer Service department was reduced as part of an ongoing reorganization, and that plaintiff's position was eliminated as a result of this reorganization. Plaintiff attempts to show that she actually returned within the 42 day period during which employees on leave of absence are reinstated pursuant to MCI policy. The summary judgment evidence, however, demonstrates that plaintiff was released only for half days, was on medication at the time which could produce sedation, and that her doctor strongly urged that she not return to work.

It is undisputed that MCI's leave of absence policy does not allow employees to return to work when their return could endanger their health or safety, or the health and safety of their co-workers. As this is uncontroverted, it establishes that plaintiff was not entitled to return to work on February 13, 1989. Rather, the undisputed summary judgment evidence shows that MCI terminated plaintiff because of the reduction of the Customer Service department and because of the leave of absence policy. There is no evidence of a causal link between filing a claim for workers' compensation benefits and termination.

ORDER

In accordance with the foregoing, it is

ORDERED that plaintiff's Motion to Remand is hereby DENIED. It is further

ORDERED that defendant's Motion for Summary Judgment is hereby GRANTED.

Signed this 1st day of June, 1990.

Melinda Harmon
/s/ MELINDA HARMON
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-2456
BRENDA POPE,
Plaintiff

v.

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant

Filed June 8, 1990

FINAL JUDGMENT

Pursuant to the Court's Order granting the Motion for Summary Judgment of defendant of this same date, it is hereby

ORDERED that judgment be entered in favor of defendant; that plaintiff take nothing from defendant; and that defendant recover of the plaintiff its costs of court.

This is a FINAL JUDGMENT.

Signed this 1st day of June, 1990.

/s/ MELINDA HARMON
Melinda Harmon
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-2456

BRENDA POPE,
Plaintiff

v.

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant

Filed July 18, 1990

ORDER

On June 8, 1990, the Clerk entered this Court's Memorandum and Order granting defendant's Motion for Summary Judgment (#68) and Final Judgment in favor of defendant (#69). This Court has just received an Appeal Alert from the United States Court of Appeals for the Fifth Circuit indicating that a ruling is needed on two pending matters.

The first is defendant's Motion to Compel (#66). Since the Court has entered Final Judgment and has closed this case, the Motion to Compel is moot.

The other item is the Bill of Costs (#74), in which defendant has listed total costs of $78,768.99 to be taxed against plaintiff, including "Other Costs" of $3,243.31 in itemized other costs and 65,862.50 as attorneys' fees. This Court is of the opinion that the costs in the former

category, itemized in Exhibit 1 to Defendant's Memorandum of Authorities on Costs, represent reasonable and necessary costs of defending the lawsuit.

The Court is further of the opinion that defendant's reasonable and necessary attorneys' fees of $65,862.50 should be taxed against plaintiff. This Court granted summary judgment to defendant on the grounds that plaintiff's claims under article 5221k of the Texas Revised Civil Statutes Annotated were time-barred and that plaintiff's claim under article 8307c was unsupported by evidence. These claims were frivolous, unreasonable and groundless.

ORDER

In accordance with the foregoing, it is

ORDERED that defendant's Motion to Compel is MOOT. It is further

ORDERED that the Bill of Costs is hereby in all things APPROVED.

Signed this 13th day of July, 1990.

/s/ MELINDA HARMON
Melinda Harmon
United States District Judge

APPENDIX H

BRENDA POPE,
Plaintiff-Appellant,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Defendant-Appellee.

NO. 90-2597.

United States Court of Appeals,
Fifth Circuit.

August 6, 1991.

Former employee brought wrongful discharge and employment discrimination action against employer. Employer removed the action to federal court. The United States District Court for the Southern District of Texas, Melinda Harmon, J., denied employee's motion to remand, refused leave to file fourth amended complaint, granted summary judgment in employer's favor and awarded attorney fees as costs to employer. Employee appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) federal statute prohibiting removal of workers' compensation claims had no application where claim based on workers' compensation law was not filed until after removal; (2) refusal to allow employee to file fourth amended complaint on eve of trial was not abuse of discretion; (3) employee's state law claims for retaliatory denial of promotion were time barred: (4) employee did not have claim for termination in violation of workers' compensation laws where compensation claim was not filed until more than two months after her termi-

nation; (5) employee failed to preserve issue of award of attorney fees for review; and (6) fees were awardable to prevailing employer under Texas statute.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, SMITH and WIENER, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

The appellant, Brenda Pope, a black woman appeals from the district court's decisions refusing to remand to state court, refusing leave to amend the pleadings a fourth time, and granting summary judgment and attorney's fees for her former employer, MCI Telecommunications Corp. in this wrongful discharge and employment discrimination action.

Because the district court had diversity jurisdiction over Pope's state law causes of action; because it was within the court's discretion to refuse a fourth amendment on the eve of trial; because there are no genuine issues of material fact such that a reasonable finder of fact could hold in Pope's favor; and because the Texas statute under which Pope chose to sue permits the award of attorney's fees to the prevailing party, we affirm the district court's decisions.

From There to Here

This lawsuit, like a wayward cat in one of its late incarnations, has presented itself in several forms.

Pope, employed by MCI since 1980, first filed, on June 6, 1986, charges with the Texas Commission on Human Rights (TCHR) and with the Equal Employ-

ment Opportunity Commission (EEOC), alleging sexual and racial harassment and that the overall level of her pay was less than that of her white male counterparts. She then filed suit in Texas state court on June 8, 1987. She amended her state court petition for the first time on July 8, 1987.

Subsequently, on August 3, 1987, MCI removed to federal court on the basis of federal question jurisdiction (discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988) and the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1988)) and diversity of citizenship.

Pope continued to work for MCI while the suit was pending. The removed suit was amended two more times to reflect subsequent events, including the denial of a Civil Rights Act of 1870, 42 U.S.C. § 1981 (1988)) pensation claim, and finally Pope's termination from employment by MCI. While the suit was pending, in October 1988, MCI began restructuring Pope's department and consolidated many positions. On December 13, 1988, Pope applied for a promotion to the position of Regional Customer Service Manager. Another applicant, a white woman, whom Pope has alleged was less qualified, was selected on January 11, 1989.

On January 30, 1989, Pope sustained injuries to her head, lower back and right wrist in an auto accident while on company business, and she consequently took an extended leave of absence to recover. Her position at that time was Communications Specialist Manager. MCI's reinstatement-from-leave policy provides reinstatement to an employee who has been on leave for more than 42 days only if the same or a comparable position is available. If no such position exists, an employee

is to be provided up to two weeks of assistance to identify a position that she can fill. After this two-week period, the employee may be laid off.

During Pope's absence, the second of two Communications Specialist Managers for the Houston region filled both spots; MCI decided to retain this second person, Ms. Vernetta Dickerson, a black woman, and reorganize the department to permanently require only one Communications Specialist Manager.

Pope returned on February 13, 1989, but was not permitted to work because she did not have a full release from her physician. She returned on March 30, 1989, after more than 42 days of leave, to find that MCI had no position for her, due to the restructuring that occurred in her absence. She was terminated effective April 20, 1989 and received severance pay of more than $15,000; it is disputed whether she was offered the two weeks of assistance in finding another position within the company.

On May 25, 1989, nearly two months *after* Pope was dismissed, she initiated a claim under the Texas Workers' Compensation Act for the January 30, 1989 auto accident injuries. Her claim form is dated May 25, 1989, as is a letter from her attorney to the Industrial Accident Board stating that she had retained him to represent her before the Board.

On August 16, 1989, she filed a second charge with the TCHR, alleging that she was unlawfully denied the promotion in retaliation for the original discrimination charges and lawsuit, and that she was terminated in retaliation for filing her Workers' Compensation claim. This complaint was filed with TCHR 217 days after

MCI's January 11, 1989 decision giving the promotion for which Pope had applied to an allegedly less qualified white woman. On August 18, 1989, Pope amended her pending lawsuit a second time to assert these additional, state-law causes of action, charging discrimination in violation of article 5221k of the Texas Commission on Human Rights Act,[1] and retaliation for filing a Workers' Compensation claim, a violation of article 8307c of the Texas Workers' Compensation Act.[2] In September 1989, in her third amended complaint, Pope expressly abandoned her federal claims, preserving only her state-law claims. These state-law claims are all that is before us in this appeal.

On January 15, 1990, MCI filed its motion for summary judgment. Before the court ruled, Pope on February 5, 1990 moved to remand the case to state court. The asserted basis of this motion was that: i) the district court was required to remand since § 1445(c) of Title 28 forbids the removal of Workers' Compensation cases,[3] and ii) § 1447(c) required a district court to remand where a case was removed "improvidently and without jurisdiction."[4] Pope also contended that because she no longer sought recovery under federal law, the district

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1. Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987 & Supp. 1991).

2. Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1991).

3. "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States." 28 U.S.C. § 1445(c) (1988).

4. "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. . . ." 28 U.S.C. § 1447(c) (1982). Section 1447(c) was amended November 19, 1988 to require that a motion to remand be made within 30 days after removal:

court lacked subject matter jurisdiction over her state-law claims.

On May 7, 1990, Pope moved for leave to amend her complaint a fourth time to introduce a common law claim of intentional infliction of emotional distress. This motion was less than one week before the rescheduled May 11, 1990 docket call (which had originally been set for April 20, 1990) and was nearly three months after the district court's February 15, 1990 deadline for non-dispositive motions which had been set by the court's original scheduling order nearly a year earlier on July 28, 1989.

On June 1, 1990, the district court denied Pope's motion to amend her complaint as untimely. The court denied the motion to remand, stating that the case was properly removable at the time it entered the federal system, and that the remaining state-law claims could be maintained on the basis of diversity. Acting on Pope's third amended complaint which asserted the remaining state-law causes of action for racial and sex harassment, unequal compensation, retaliatory denial of promotion, and unlawful discharge for instituting a Workers' Compensation claim, the district court granted summary judgment in favor of MCI. The court held that the Texas article 5221k claims of unequal compensation, sex and

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> "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

28 U.S.C. § 1447(c) (1988) (As amended by Judicial Improvements and Access to Justice Act, Pub.L. No. 100-702, Title X, § 1016(c), 102 Stat. 4670 (1988)). The act does not provide the effective date for the amendment to § 1447(c). We have joined the other courts that have considered the question in holding that it took effect November 19, 1988, the day the president signed the bill, *In re Shell Oil Co.*, 932 F.2d 1523, 1526 (5th Cir. 1991).

racial harassment and retaliatory denial of promotion were time-barred, and that there was no genuine issue of material fact regarding the article 8307c claim for unlawful discharge under the Texas Workers' Compensation statute, because Pope offered no evidence of a causal link, as required by Texas law, between her termination and her filing of a claim for Workers' Compensation benefits.

These decisions were incorporated in three separate documents signed by the court on June 1: 1) an order denying Pope's motion for leave to amend; 2) a memorandum and order denying Pope's motion to remand and granting MCI's motion for summary judgment; and 3) a final judgment in favor of MCI which expressly provided that MCI recover its costs[5] as permitted by article 5221k.[6] No mention was made of attorney's fees as such. The district clerk entered all three documents on June 8, 1990.

MCI filed a bill for costs on June 18, 1990 in the amount of $78,768.99, including charges of $65,862.50 representing attorney's fees paid by MCI to its counsel. On June 27, 1990, Pope filed her notice of appeal from "the District Court's Memorandum and Order entered in this cause on June 8, 1990 in which the Court granted Defendant's Motion for Summary Judgment, denied Plaintiff's Motion to Remand and denied Plaintiff's Motion for Leave to Amend." The notice of appeal did not mention either the award of costs or attorney's fees as such. On

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5. This third document reads:
"Pursuant to the Court's Order granting the Motion for Summary Judgment of the defendant of this same date, it is hereby ORDERED that judgment be entered in favor of defendant; that plaintiff take nothing from defendant; and that defendant recover of the plaintiff its costs of court.
This is a FINAL JUDGMENT."

6. *See infra*, note 48 and accompanying text.

July 18, the district court issued its order approving MCI's costs and attorney's fees, stating that Pope's claims were "frivolous, unreasonable and groundless." Pope never objected to the allowance of costs or attorney's fees, much less the large dollar amount thereof. Nor did she explicitly appeal this second order, or attempt to amend the notice of appeal, but raised the issue for the first time in her briefs to this court and at oral argument before us.

Denial of Motion to Remand

The district court's denial of Pope's motion to remand is reviewed for abuse of discretion.[7]

Pope's original brief to this court argued that the district court was required to remand the case because 28 U.S.C. § 1445(c) prohibits removal to federal district court of state Workers' Compensation claims[8] and because 28 U.S.C. § 1447(c) required remand where a case was removed "improvidently and without jurisdiction."[9] She contended that the district court lacked subject matter jurisdiction over her remaining state-law claims after her federal claims were dropped.

Section 1447 was amended November 19, 1988 to require that a motion to remand be made within 30 days after removal:

> "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[10]

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7. *Spencer v. New Orleans Levee Board*, 737 F.2d 435, 438 (5th Cir. 1984).

8. *See supra*, note 3.

9. *See supra*, note 4.

Obviously, the amendment had no effect at the time of the original removal on August 3, 1987, more than a year before the effective date of the amendment.[11] Pope's motion to remand, however, came nearly 15 months after the statute was amended, nearly six months after she added her Workers' Compensation cause of action, and five months after she dropped her federal claims. Nonetheless, we need not determine here whether the 30-day requirement applied to Pope's motion to remand, and if so, when the time began to run, because under any application, Pope fails.

[1] The case was not removed "improvidently and without jurisdiction" under the old remand statute. It was without any doubt properly removed on the basis of diversity. MCI is a Delaware corporation with its principal place of business in the District of Columbia and Pope is a resident of Texas. The case was probably removed properly on the basis of federal questions under the well-pleaded complaint rule, although this is not as clear from the face of the removed complaint (Pope's First Amended Petition).

[2] While § 1445(c) does indeed prohibit the removal of Workers' Compensation claims, in this case, a Workers' Compensation claim was never removed. At the time of removal, Pope had not yet asserted this claim. Indeed, nothing relevant to this cause of action had yet occurred: Pope had not been fired, she had not sustained her auto injuries, had not filed the Workers' Compensation claim and had not yet suffered the alleged retaliation. Adding

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10. 28 U.S.C. § 1447(c) (1988).

11. *See supra*, note 4.

the Workers' Compensation claim later by amendment did not constitute removal of that claim.

[3] Similarly, there was no § 1447(c) "defect in [the] removal procedure," and the district court did not lack subject matter jurisdiction after the federal claims were dropped because diversity jurisdiction remained.

The district court did not abuse its discretion in denying Pope's motion to remand. The case was properly removed and diversity-based subject matter jurisdiction remained after Pope amended her complaint.

Fourth Motion to Amend the Pleadings

[4] Although Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires" even after the action has been placed on the trial calendar,[12] denial of leave to amend is reviewed for abuse of discretion.[13]

The proposed amendment to Pope's pleadings was her fourth, and sought to add an entirely new cause of action less than a week before trial and long after extensive discovery had taken place. This not only might subject MCI to prejudice, but it also would have interfered with the trial date.

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12. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981).

13. *Texas Extrusion Corp. v. Lockheed Corp.*, 844 F.2d 1142, 1158 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S. Ct. 311, 102 L.Ed.2d 330 (1988); *Carter v. Procunier*, 755 F.2d 1126, 1129 (5th Cir. 1985). *Cf. Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed.2d 222, 225-26, (1962) (Leave may be denied for "delay, bad faith . . . , repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , futility of amendment. . . .").

This new claim was not about something recently discovered. Pope could have added the claim for intentional infliction of emotional distress years earlier. She admits that her proposed amendment is based upon the same facts as her previous claims. Granting that proffering the amendment does not warrant aspersions of bad faith, the court did not abuse its discretion in refusing to permit a fourth amendment on the eve of trial.

Summary Judgment Claims

This court, in evaluating a summary judgment motion, applies the same standard that governs the district court.[14] We will not affirm a summary judgment unless "we are convinced after an independent review of the record, that 'there is no genuine issue as to any material fact' and that the movant is 'entitled to a judgment as a matter of law.' "[15]

Retaliatory Denial of Promotion

[5] The district court held that Pope's state-law claims for retaliatory denial of promotion in violation of the Texas Commission on Human Rights Act[16] were time-barred. Pope's claims were filed 217 days after she first knew about the alleged discrimination and retaliatory denial of promotion. Section 6.01 of article 5221k requires a charge of employment discrimination to be filed "within

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14. *Latimer v. Smithkline & French Laboratories*, 919 F.2d 301, 303 (5th Cir. 1990).

15. *Brooks, Tarlton, Gilbert, Douglas & Kressler v. U.S. Fire Ins. Co.*, 832 F.2d 1358, 1364 (quoting Fed. R. Civ. P. 56(c)), *clarified on reh'g on other grounds*, 832 F.2d 1378 (5th Cir. 1987).

16. Tex. Rev. Civ. Stat. Ann. art. 5221k (Vernon 1987 & Supp. 1991).

180 days after the alleged unlawful employment practice occurred; untimely complaints *shall be dismissed* by the commission."[17]

Pope's attorneys argued before this court with straight faces, that because the state law's section 1.02(1) declares that the act is intended "to provide for the execution of the *policies* embodied in Title VII of the federal Civil Rights Act of 1964,"[18] the federal court should ignore the act's explicit time limitations and instead apply the limitations period provided in the federal statute, under which Pope did not choose to sue, because "it was the evident intent of the legislature to accord aggrieved persons the widest possible array of remedies." We do not make the federal statutory laws, much less legislate state statutes of limitations. We have no prerogative to ignore a precise Texas time limitation.

The fact that Title VII provides that employment discrimination claims must be filed within 180 days with the EEOC[19] does not alter the problem. Nor does the further provision that any person who first seeks relief from a state or local agency entrusted with policing such violations is entitled to a 300-day period for the EEOC filing.[20] In *Urrutia v. Valero Energy Corp.*[21] and *Mennor v. Fort Hood Nat'l Bank*[22] this court held that a party

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17. *Id.* at § 6.01 (emphasis added).

18. *Id.* at § 1.02(1).

19. 42 U.S.C. § 2000e-5(e) (1988).

20. *Id.*

21. 841 F.2d 123, 125 (5th Cir.), *cert. denied*, 488 U.S. 829, 109 S. Ct. 82, 102 L.Ed.2d 59 (1988).

22. 829 F.2d 553, 555-56 (5th Cir. 1987).

pursuing a federal claim under Title VII was entitled to the 300-day period even when the state filing was too late.[23]

Since Pope has not pursued a *Title VII* remedy, *Mennor* and *Urrutia*, dictating a 300-day limit in regard to Title VII claims, offer no help. Texas was under no obligation to—and did not—provide a statute of limitations that matches that contained within Title VII. This court cannot fault the Texas time limitation. Pope's lamentations that *had she chosen to file under the federal act*, she would have been afforded the 300-day limitations period were well answered by the trial court: because Pope chose to file under Texas article 5221k, rather than Title VII, the federal limitations period was unavailable and the state limitations period governs her state claim.

Faithful to our *Erie* duty, we follow Texas court decisions that the time limits under article 5221k are mandatory, and that an action is not maintainable where the limitations period is not followed.[24]

Workers' Compensation Claim

Pope contends that she was terminated in violation of article 8307c of the Texas labor laws[25] in retaliation for

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23. *Accord E.E.O.C. v. Commercial Office Prod. Co.*, 486 U.S. 107, 108 S. Ct. 1666, 100 L.Ed.2d 96 (1988).

24. *Schroeder v. Texas Iron Works, Inc.*, 769 S.W.2d 625, 627-28 (Tex. App.—Corpus Christi 1989), *aff'd*, No. C-8843, 34 Tex. Sup. Ct. J. 642 __S.W.2d__ (Tex. 1991) (1991) WL 99942, 1991 Tex. LEXIS 73); *Green v. Aluminum Co. of America*, 760 S.W.2d 378, 380-81 (Tex. App.—Austin 1988, no writ).

25. Article 8307c provides:

> No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, insti-

filing a Workers' Compensation claim. As the party moving for summary judgment, MCI initially bore the burden of demonstrating the absence of a genuine issue of material fact.[26] The evaluation of which facts are material calls for the court to consult substantive law.[27]

At least where the movant's evidence shows no genuine issue of material fact, to avoid summary judgment the nonmovant must demonstrate the existence of evidence on each element essential to its case, because a complete failure of proof of an essential element would render all other facts immaterial[28] and thus show that there are indeed no genuine issues of material fact.

[6] An employee claiming discharge in violation of article 8307c certainly has the burden of at least demonstrating a causal link between his discharge and the filing of the claim for Workers' Compensation benefits.[29] While it is true, as Pope points out, that the employee can carry this burden without showing that he was fired

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tuted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Tex. Rev. Civ. Stat. Ann. art. 8307c (Vernon Supp. 1991).

26. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 323, 106 S. Ct. 2548, 2552, 2553, 91 L.Ed.2d 265, 273-74 (1986).

27. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2509, 91 L.Ed.2d 202, 210-11 (1986).

28. *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53, 91 L.Ed.2d at 273-74 (Nonmoving party must designate "specific facts showing that there is a genuine issue for trial."); *Matter of Lewisville Properties, Inc.*, 849 F.2d 946, 950 (5th Cir. 1988).

29. *Benton v. Kroger Co.*, 640 F.Supp. 1317, 1321 (S.D. Tex. 1986); *Hughes Tool Co. v. Richards*, 624 S.W.2d 598, 599 (Tex. Civ. App.—Houston [14th Dist.] 1981), *cert. denied*, 456 U.S. 991, 102 S. Ct. 2272, 73 L.Ed.2d 1286 (1982).

solely because of the filing of his Workers' Compensation claim,[30] the employee must show that the filing of the claim was a determining factor in the discharge.[31]

[7, 8] Whatever the doubt about how onerous the burden is to show "a determining factor," it requires at the very least more than what Pope brought to the court. Indeed, Pope alleges that she was fired on the 29th day of March, 1989. It was not until May 25, 1989, nearly two months later, that she filed the Workers' Compensation claim for injuries that occurred on January 30, 1989. How something which has not yet occurred can be asserted as evidence of an earlier discriminatory act was never explained. Pope asserted in her deposition her subjective belief that the firing was based upon her initiation of the Workers' Compensation claim, but offered no affidavits or other evidence showing how her subsequent claim for benefits was a determining factor in her earlier discharge. While article 8307c may sometimes apply "even when a plaintiff has not yet filed a Workers' Compensation claim before being discharged,[32] some evidence of a causal connection beyond the plaintiff's subjective belief is required.[33]

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30. *General Elec. Co. v. Kunze*, 747 S.W.2d 826, 830 (Tex. App.—Waco 1987, writ denied).

31. *Azar Nut Co. v. Caille*, 720 S.W.2d 685, 687 (Tex. App.—El Paso 1986), *aff'd*, 734 S.W.2d 667 (Tex. 1987).

32. *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1090 n. 1 (5th Cir. 1991), citing *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77, 80 (Tex. App.—Dallas 1986, no writ).

33. *Cf. Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986) (employee's subjective belief that he was fired for discriminatory reasons not enough to avoid summary judgment). Furthermore, the cases that Pope raises that rely even in part upon the employee's subjective evaluation of whether discrimination occurred also had Rule 56 evidence of discriminatory intent. *E.g.*, *Hunt v. Van Der Horst Corp.*, 711 S.W.2d 77 (Tex. App.—Dallas 1986, no writ).

We do not weigh MCI's assertions against Pope's or engage in credibility determinations. We simply hold that there is no genuine issue of fact concerning the critical issues of a § 8307c retaliation claim. Pope makes no showing to put in issue MCI's factual evidence that the two events were not linked, that Pope's initial filing for Workers' Compensation benefits occurred two months *after* she was terminated, that MCI had reorganized her department for independent reasons, and that MCI's policy only guaranteed positions for returning sick employees, regardless of race or sex, for 42 days.

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' "[34] At best, Pope has shown only that "there is some metaphysical doubt as to the material facts." [35] The district court properly granted summary judgment for MCI.

Attorney's Fees

[9] Pope's June 27, 1990 notice of appeal explicitly appealed from "the District Court's Memorandum and Order entered in this cause on June 8, 1990 in which the Court granted Defendant's Motion for Summary Judgment, denied Plaintiff's Motion to Remand and denied Plaintiff's Motion for Leave to Amend." The notice of appeal did not mention either the award of costs or attorney's fees as such. Because Pope never contested

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34. *Celotex v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986).

35. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355-56, 89 L.Ed.2d 538, 551-52 (1986).

the award of attorney's fees or the large amount thereof, but raised the issue for the first time in the brief filed with this court on September 17, 1990, we need not decide whether the award of costs, and the approval of the amount of the costs including attorney's fees, was appropriate.

Rule 3(c) of the Federal Rules of Appellate Procedure requires that "[t]he notice of appeal shall . . . designate the judgment, order or part thereof appealed from." Although a litigant's filings under the rule are liberally construed,[36] and although a filing that presents the functional equivalent of what the rule requires can satisfy its dictates,[37] the court "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." [38] Pope did not meet the requirements of Rule 3(c).

Thus, when an appellant " 'chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.' " [39]

In *C.A. May Marine Supply Co. v. Brunswick Corp.*,[40] this court evaluated an order disposing of two separate motions, one for attorney's fees, the other for a new trial.

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36. *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962).

37. *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L.Ed.2d 245 (1988).

38. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 108 S. Ct. 2405, 2409, 101 L.Ed.2d 285, 291-92 (1988).

39. *Ingraham v. United States*, 808 F.2d 1075, 1080 (5th Cir. 1987) (quoting *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985)).

40. 649 F.2d 1049 (5th Cir. July 1981), *cert. denied*, 454 U.S. 1125, 102 S. Ct. 974, 71 L.Ed.2d 112 (1981).

Both were brought before the appellate court by a notice of appeal that mentioned only the judgment on the motion for a new trial. This court refused to consider the issue of attorney's fees, stating:

> Where the appellant notices the appeal of a specified judgment only or a part thereof, however, this court has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal. . . . In this situation, because the intent to appeal is not apparent, prejudice to the adverse party is likely to result if review is granted. *Where parts of the judgment are truly independent, there is more likelihood that the designation of a particular part* in the notice of appeal will be construed as an intent to leave the unmentioned portions undisturbed. . . . *The express mention in the notice of appeal of one part of the order negated any inference of intent to appeal from the order as a whole. We therefore, lack jurisdiction to review the question of the appellant's right to attorney's fees.*[41]

We thus conclude that because Pope's notice of appeal designated appeal from "the District Court's Memorandum and Order . . . in which the Court granted Defendant's Motion for Summary Judgment, denied Plaintiff's Motion to Remand and denied Plaintiff's Motion for Leave to Amend," and did not specifically mention the award of attorney's fees, the issue of attorney's fees is not before us.

Those cases that do construe notices of appeal liberally to find jurisdiction do so where it is clear, from the

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41. *Id.* at 1056 (emphasis added, citations omitted).

face of the notice, that the appeal intends to raise all issues or other parties.[42] By explicitly mentioning the decisions on leave to amend, remand and summary judgment, Pope did not put the court or MCI on notice that she intended to appeal the order awarding MCI its attorney's fees.

The only difference between the instant case and *Brunswick* is that in *Brunswick*, the two orders were entered on the same day, while in the instant case the court's approval of the amount of MCI's costs, and especially the attorney's fees, was issued long after Pope filed her notice of appeal, and long after the entry of the final judgment,[43] although the court's award of costs was recited in the final judgment for MCI.[44] Thus we have no jurisdiction to evaluate the award of attorney's fees.

[10] Furthermore, Pope has shown no abuse of discretion[45] by the trial court. Pope failed to do anything to contest MCI's itemized bill of costs including attorney's fees. Local Rule 4 B of the Southern District of Texas provides that a party must oppose a bill of costs within five days of its filing. Because she did not oppose the request for costs including attorney's fees in the court below, Pope may not raise the issue for the first time on appeal.[46] Pope was well aware of MCI's bill of costs and

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42. *See, e.g., Scherer v. Kelley*, 584 F.2d 170, 174 (7th Cir. 1978), *cert. denied sub nom. Scherer v. Webster*, 440 U.S. 964, 99 S. Ct. 1511, 59 L.Ed.2d 778 (1979).

43. *See supra*, note 5 and accompanying text.

44. *Id.*

45. *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 237 (5th Cir. 1990).

46. *Id.* at 239 n. 7 ("The [district] court need consider the nonprevailing plaintiff's financial condition only if that party has first affirmatively, and with sufficient timeliness before the fixing of the

attorney's fees and either simply chose to ignore it, or was completely indifferent to it. This indifference was carried further in her notice of appeal.

[11] Finally, we cannot find that the district court abused its discretion in awarding attorney's fees as part of MCI's costs, as permitted by article 5221k. "[A]ttorney's fees, as an element of damages, are a matter of substantive state law." [47] Section 7.01(e) of article 5221k provides that the court may assess costs, and that "[i]n any action or proceeding under this Act, the court in its discretion may allow the prevailing party, other than the commission, a reasonable attorney's fee as part of the costs." [48] This language is virtually identical to the corresponding provision of Title VII.[49]

Like the parties, we find no Texas cases regarding the award of attorney's fees to a prevailing *defendant* under this provision. We therefore look to federal precedent under Title VII for guidance. Under federal law, a prevailing defendant in a Title VII case can recover attorney's fees only upon a showing that the plaintiff

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amount of the award, expressly requested consideration thereof. . . ."); *Stewart v. Lubbock County, Texas*, 767 F.2d 153, 157 (5th Cir. 1985) (affirming an award of attorneys' fees where the non-prevailing party did not respond to the prevailing party's application for attorneys' fees as required by Local Rule and by the court's order), *cert. denied*, 475 U.S. 1066, 106 S. Ct. 1378, 89 L.Ed.2d 604 (1986).

47. *Gulf Union Indus., Inc. v. Formation Sec., Inc.*, 842 F.2d 762, 766 (5th Cir. 1988).

48. Art. 5221k, § 7.01(e) (Vernon & Supp. 1991).

49. 42 U.S.C. § 2000e-5(e) (1988) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as a part of the costs. . . .").

filed a frivolous, groundless, unreasonable or bad faith suit.[50]

Pope came to court with untimely claims of discrimination under § 5221k, frivolously and unreasonably ignoring altogether the Texas time limitation. She came with no evidence to support her charge that her discharge was related to the filing of a Workers' Compensation claim, thus her charge was groundless and unreasonable. The district court correctly interpreted the Texas statute in accord with Title VII, and did not abuse the discretion afforded by article 5221k in holding that Pope's claims were "frivolous, unreasonable and groundless," and therefore awarding costs including attorney's fees.

The district court was correct in all its rulings.

AFFIRMED.

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50. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421-22, 98 S. Ct. 694, 700, 54 L.Ed.2d 648 (1978).

APPENDIX I

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-2597

BRENDA POPE,
Plaintiff-Appellant,

v.

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant-Appellee.

(Filed September 3, 1991)

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(September 3, 1991)

Before BROWN, SMITH and WIENER, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby
DENIED.
ENTERED FOR THE COURT:

JOHN R. BROWN
United States Circuit Judge